NO. 46523-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN FESSEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan L. Clark, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

REQUIRING JURORS TO ARTICULATE THE REASON FOR THEIR DOUBT IS UNCONSTITUTIONAL

Fessel's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 41 (instruction 3); see also 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Fessel's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. Fessel contends, for reasons set forth more fully in the opening brief, that this instruction required more than just a reasonable doubt to acquit; it required a reasonable, articulable doubt. This articulation requirement undermined the presumption of innocence. Brief of Appellant (BOA) at 3-11.

The State maintains the instruction is a correct statement of the law, and that Fessel's failure to object to the instruction bars review. Brief of Respondent (BOR) at 2-6. For the following reasons, Fessel asks this Court to reject the State's arguments.

The State's claim that Fessel's challenge to WPIC 4.01 is procedurally barred is inconsistent with its acknowledgment that our Supreme Court has required trial courts to give the WPIC 4.01 instruction in every criminal case. BOA at 4-5 (discussing Bennett, 161 Wn.2d at 317-18). Even if Fessel's attorney had objected to the instruction, the trial court would have given the instruction anyway. This situation is unique because, as the State recognizes, (1) trial courts must define reasonable doubt and (2) trial courts must use WPIC 4.01 to do so. BOR at 4-6. In such circumstances, Fessel's failure to object should not preclude review. See also State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999) (noting that when State argues defense counsel's acquiescence is invited error, it "blur[s] the lines between the invited error doctrine and the waiver theory").

Moreover, while the Bennett court required trial courts to instruct juries using WPIC 4.01, it also recognized, "The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if

reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. Courts must therefore vigilantly protect the presumption of innocence and have done so in other contexts. See BOA at 8-11 (collecting cases holding articulation requirement was unconstitutional burden-shifting when prosecutor argued jurors had to "fill in the blank" with a reason to doubt).

In addition to the cases regarding the unconstitutional fill-in-the-blank argument, this Court recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The Court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. Id. at 422-23. The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." Id. at 423. But the court did not explain or

analyze why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts. A judge's erroneous instruction requiring articulation of a reasonable doubt more greatly damages the presumption of innocence than a prosecutor's closing argument ever could. See id. at 427 (Bjorgen, J., dissenting) ("[I]f the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge.").

The State also argues Washington courts have already considered and rejected Fessel's challenge to WPIC 4.01, citing State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). BOR at 5-6. The Thompson court acknowledged the "instruction has its detractors" yet felt "constrained to uphold it." 13 Wn. App. at 4-5. Similarly, the Bennett court recognized WPIC 4.01 was not problem-free, noting WPIC 4.01 was required only "until a better instruction is approved." 161 Wn.2d at 318. Bennett and Thompson hardly provide a ringing endorsement for WPIC 4.01.

In addition to Bennett and Thompson, the State also cites State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), for the proposition that courts have already considered and rejected the "reason to doubt" argument. See BOR at 4-5. But this case, was decided more than 40 years ago and can no longer be squared with State v. Emery, 174 Wn.2d 741,

278 P.3d 653 (2012), and the other fill-in-the-blank-cases. See BOA at 8-11.

In Emery, our supreme court held that an articulation requirement "impermissibly undermine[s] the presumption of innocence." 174 Wn.2d at 759. Because WPIC 4.01 requires jurors to articulate the reason for their doubt, it "subtly shifts the burden to the defense." Id. at 760. Given that the State will avoid supplying jurors with reasons to doubt, WPIC 4.01 suggests that either the jury or the defense should supply them, which degrades the presumption of innocence. Id. at 759.

However, the State does not respond to Fessel's observation that Emery did not explain how or why an articulation requirement is unconstitutionally unfair when the prosecutor argues it in closing but not unconstitutionally unfair when the trial court requires articulation in a jury instruction. BOA at 8, 10. Because the Emery court was not considering a direct challenge to WPIC 4.01's language, its approval of WPIC 4.01's language does not and cannot preclude Fessel's argument that the articulation requirement is unconstitutional in any and all contexts in which it arises.

Finally, the State invokes the doctrine of stare decisis, arguing that Fessel must show the cases approving WPIC 4.01 are incorrect and harmful. BOR at 5 (citing In re Rights to Waters of Stranger Creek, 77

Wn.2d 649, 653, 466 P.2d 508 (1970)). But, as discussed, none of the cases the State cites addresses the precise arguments or issues Fessel raises, and therefore none of them needs to be overruled for Fessel to challenge WPIC 4.01's articulation requirement. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do no rely on cases that fail to specifically raise or decide an issue."). Moreover, given that this court lacks the authority to overrule Washington Supreme Court cases, it would be counterproductive to ask this court to do so even if it were necessary.

Nowhere in the State's response does the State actually address the substance of the articulation problem Fessel has identified. The State instead attempts to deflect the issue in hopes this court will not consider the serious flaw that a basic examination of WPIC 4.01's language reveals. This court should consider the substance of Fessel's arguments and reverse.

B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should reverse Fessel's conviction and remand for a new trial.

DATED this 8th day of July, 2015.

Respectfully submitted,

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[X] JUSTIN FESSEL
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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF JULY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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